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Brief of Burr for P. C. Co

No. 552.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY,
Executor of Charles R. Lynde, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

COLUMBUS, OHIO.
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Executor of Charles R. Lynde, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ON MOTION TO DISMISS THE WRIT OF ERROR.

This was a foreclosure suit brought in 1891, in the Common Pleas Court of Franklin County, Ohio, by Lynde, who claimed to be the owner of thirty-six of the second mortgage bonds of The Columbus & Indianapolis Central Railway Company for one thousand dollars each, dated November 1st, 1864, together with the semi-annual interest coupons, maturing May 1st, 1879, and thereafter, secured by mortgage on the railway, extending from Columbus, Ohio, to Indianapolis, Indiana, which is now owned by plaintiff in error, The

Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The petition (printed record, p. 6), made defendants with others, Archibald Parkhurst, trustee of the bonds, The Columbus, Chicago & Indiana Central Railway Company, corporate successor of the alleged maker of the bonds, and the plaintiff in error here, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Parkhurst and the C. C. & I. C. Ry. Co. made default.

The P. C. C. & St. L. Ry. Co. answered (p. 12 and 23), denying that the instruments in question were ever made or issued by the alleged maker or either of its corporate successors, and denying that they ever became a lien upon the railway property.

The answer further set out the proceedings in a former foreclosure suit in the U. S. Court for Ohio and Indiana, in which the railroad was sold and the property thereafter passed by successive conveyances to its present owner, the answering defendant.

The answer further averred that the alleged lien of the plaintiff, if acquired at all, was acquired during the pendency of that foreclosure suit, and while the railroad was in the custody of the Court by its receivers, and by virtue of the proceedings and sale in that suit such pretended lien was extinguished.

By this answer the plaintiff in error claimed the legal effect of the decree of foreclosure and sale to be the extinguishment of plaintiff's alleged lien on its property.

To this answer a reply was filed in the nature of a general denial, and further alleging that Lynde was a bona fide purchaser for value without notice (p. 20).

The Trial Court found in favor of the plaintiff's lien, and decreed a sale of the road for the payment of his bonds. The Court found the facts and its conclusions of law separately, and to review the questions of law the question was taken to the State Circuit Court and to the Supreme Court where the judgment of the Trial Court was affirmed in the opinion forming part of the record (page 54).

The State Court thus denied to the decree and proceedings in foreclosure of the Federal Courts the legal effect claimed for them by the plaintiff in error, and made a case where a title or right is claimed under an authority exercised under the United States, and the decision of the State Court was in denial of the title or right so asserted.

The jurisdiction of this Court to review the decision of the State Court in such case seems clear.

Embry v. *Palmer*, 107 U. S., 3.
Dupasseur v. *Rochereau*, 21 Wal., 130.

So far as the motion at bar proceeds upon the ground that no federal question is involved, we think it is not well taken.

A consideration of the other ground of the motion, to-wit: whether the question is frivolous, requires a brief history of the case as it appears in the record.

On the 1st of November, 1864, the Columbus and Indianapolis Central Railway Company, a corporation of Ohio and Indiana, prepared, signed and sealed its one thousand bonds of $1.000.00 each, payable to William D. Thompson, or bearer, on the 1st day of November, A. D. 1904, with coupons annexed for the

semi-annual interest, and to secure their payment, executed a second mortgage upon its entire line from Columbus to Indianapolis, to Archibald Parkhurst, Trustee. (p. 24, 25).

Shortly after the one thousand bonds of the issue in question were signed and sealed, they were all duly certified by the trustee, and prior to January 1, 1867, seven hundred and ninety of them had been exchanged as provided in the mortgage, and thirty-one had been duly sold. (p. 31). The remaining one hundred and seventy-nine bonds, including all of the thirty-six bonds in suit, had been sometime prior to 1870 delivered by Parkhurst, the Trustee, to B. E. Smith, as President of the Company, and remainded *unissued* in his possession as president of the maker company and of the companies into which it was afterwards consolidated, until November and December, 1875. (p. 31).

In September, 1867, the Columbus and Indianapolis Central Railway Company, maker of the bonds, was consolidated with other roads into and became the Columbus and Indiana Central Railway Compaay, (p. 31), and again in February, 1868, this latter company was consolidated with another, and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants, which we will hereafter designate as the C., C. & I. C. Co. (p. 31, 32).

On the 20th of February, 1868, the C., C. & I. C. Co. made its mortgage on its line, including the property in question, to Roosevelt & Fosdick, trustees, to secure an issue of $15,000,000.00 of bonds, of which bonds to the amount of more than ten million dollars were sold. (p. 32).

About the 15th of December, 1868, the same company made another mortgage to Fowler & Thomas, Trustees, to secure an issue of $5,000,000.00 of bonds. (p. 32). This mortgage recited that the company was indebted for outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company in the sum of $821,000.00, and bonds of the $5,000,000,-00 issue were to be set aside, appropriated and used for the sole purpose of taking up these and certain other specified bonds. (p. 32).

The 821 bonds above mentioned were those secured by the Parkhurst mortgage in question, and which were all of that issue which had been put out. (p. 32).

About the 22nd day of January, 1869, the C., C. & I. C. Ry. Co. leased its entire line to the Pittsburgh, Cincinnati & St. Louis Ry. Co. for 99 years, renewable forever, which latter road took possession and operated it until the sale under foreclosure, mentioned hereafter. (p. 33).

The lease provided that out of the rentals there should be paid the interest on the $15,000,000.00 and the $5,000,000.00 issue, and upon certain income bonds thereafter to be issued not to exceed $2,000,-000.00. (p. 33).

It was further provided in the lease that no issue of bonds beyond the three last named should be made by the lessor company without the consent of the boards of directors of the respective parties to the lease. (p. 31). Thereafter no consent was ever given by the board of directors of C., C. & I. C. Co. to the issue or sale of the one-hundred and seventy-nine bonds (which

include the plaintiff's thirty-six) or of any of them. (p. 34).

On the 1st and 2nd days of February, 1875, in the U. S. Circuit Courts for Ohio, Indiana and Illinois, Roosevelt and Fosdick, trustees, commenced actions for the foreclosure of their mortgage, making the Railway Company and the Trustees under the Fowler and Thomas mortgage, and others, defendants, but not making Parkhurst a party in respect to his prior mortgage, and not seeking to have the road sold free of the Parkhurst mortgage in question. (p. 34). At the same time the plaintiffs moved for the appointment of a receiver or receivers to take possession of the property, and out of the rentals to pay the interest on the bonds issued under their mortgage and the underlying mortgages, etc. (p. 34).

On the 2nd and 3rd of February, 1875, Roosevelt and Fosdick were themselves appointed receivers, and the Railway Company was ordered by the Court to forthwith transfer and convey to the receivers all the mortgaged premises which was done on the 25th of May thereafter. (p. 35).

It is important to have the situation at this point definitely fixed in the mind.

The one hundred and seventy-nine bonds, including the thirty-six in suit, had never been issued or delivered to any one, and the intention to use them had been abandoned. The maker had long since gone out of existence by the consolidations of 1867–8.

A mortgage (to Fowler and Thomas) had been put upon the property, subject to the lien of the 821 issued bonds, and no more. In the lease, the lessor company

had provided for the payment, by the lessee, of the interest on these 821 bonds, and had bound itself not to issue any more bonds of any sort without the consent of the board of directors of both companies, which was never given. Beyond this, the property was now in the custody of the law by proceedings of which all the world was bound to take notice. Under those proceedings the legal title to all the property had been conveyed to the Receivers to protect it from any disposition to the prejudice of the Roosevelt and Fosdick mortgage and the holders of bonds thereunder. The Court had taken it into its possession for that express purpose.

The situation above set forth continued until the months of November and December of that year (1875), in which month one B. E. Smith, who had during this time been President of the C., C. & I. C. Co., and its predecessors, borrowed upon his own notes, and for his own purposes, the sum of $48,000 of the Newbolds in Philadelphia, and needing collateral for the same, he resurrected these one hundred and seventy-nine unissued bonds, cut off and suppressed all past due coupons, and falsely pretending to the Newbolds that they were his individual property, pledged a part of them, including the thirty-six in suit, as collateral security for his loan—all without the knowledge or consent of the Railway Company. (pp. 37–38.)

Smith renewed his notes from time to time, receiving from the Newbolds the coupons as they came due, and suppressing them, till January 14, 1878, when the Newbolds, under their collateral contract, sold the bonds,

applying the proceeds to the payment of the loan, and paying the balance to Smith.

No part of the proceeds was ever used for the benefit of the Railway Company. (p. 38.)

The Newbolds themselves bought the bonds, and soon after sent them for sale, to New York, where plaintiff, in May, July and August, 1878, bought them in the usual course of business, without any knowledge of their infirmity. (p. 38.)

Soon after his purchase, August 27, 1878, the plaintiff caused them to be registered in his name by the Secretary of the Union Trust Company, the Registrar, who made no inquiry with regard to their origin. (p. 39.)

Afterward, A. Iselin & Company, acting for the receivers and for the bondholders' committee, paid Mr. Lynde the coupons for May 1, and November 1, 1878, having no knowledge at the time, that these bonds had not been regularly issued by the Railway Company. The money to pay the coupons was furnished by the bondholders' committee, who were afterwards reimbursed by the Receivers. (p. 39.) Before another coupon was presented for payment the fraud came to light and when plaintiff, in October, 1879, presented his coupons due May 1, 1879, for payment, he was refused. And this was the first knowledge he had that all was not right with these bonds. (p. 39.)

From 1871 until plaintiff purchased the bonds in question, he held some of the 821 valid bonds of this issue, on all of which the Railway Company defaulted in payment of the interest due May and November, 1875, and it was not paid till after June 30, 1876, when it was paid by the Receivers, all of which facts were

known to the plaintiff when he purchased the bonds in question. (p. 39.)

No further change occurred in the situation, and on the 15–23 days of November, 1882, decrees of foreclosure were entered in the Roosevelt and Fosdick suits for the non-payment of the interest on their bonds. (p. 35.)

In the decree of foreclosure it was ordered that the property be sold subject to the outstanding sectional bonds prior in lien to the Roosevelt and Fosdick mortgage, and to all other paramount liens thereon, but free from the liens then represented by any party to the cause, and that the purchaser should hold, possess and enjoy said property "*as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same.*" (p. 36.)

And it was further decreed that by the sale to be made, "the defendants in said suits respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of said suits* by the said Roosevelt and Fosdick *as purchasers, incumbrances or otherwise* howsoever, should be and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold, and every or any part thereof." (p. 36.)

The property was duly sold, the proceeds being insufficient to pay the bonds issued under the Roosevelt

and Fosdick mortgage, and, of course, not reaching the bonds issued under the Fowler and Thomas mortgage. (p. 36.)

Afterwards by successive conveyances and a consolidation, the property duly came into the possession and ownership of the P., C., C. & St. L. Railway Company, Plaintiff in error. (p. 36-37.)

The defendant below, The P., C., C. & St. L. Ry. Co., having acquired the title to the property, stood in the shoes of the purchaser at the judicial sale, and was entitled to defeat the claim of the plaintiff against its property—the only matter in which it was interested—by showing either that the bonds were not valid obligations, or that the holder, plaintiff below, was not entitled to a lien upon the property of plaintiff in error for their enforcement.

Jones on Corporate Bonds and Mortgages, sec. 683.

Hackensack Water Co., v. *DeKay*, 36 N. J. Eq. 548, 555.

From the foregoing statement of facts it appears that when the foreclosure suit of Roosevelt and Fosdick was begun, and the road went into the hands of the receivers, the property was encumbered by the lien of the Parkhurst mortgage to the amount of $821,000. and no more.

The decree and the deed made in pursuance of it undertook to convey the property encumbered by no greater burden than it bore at that date. That this was the intention of the decree, is manifest. The outstanding sectional bonds, prior in lien to the Roosevelt and Fosdick mortgage mentioned in the decree and subject

to which the road was sold, were the 821 Parkhurst bonds. The decree undertook to invest the purchaser with the property as fully and completely as the Columbus, Chicago & Indiana Central Railway Company at the commencement of the suit by Roosevelt and Fosdick, held the same and all persons, claiming under the Company subsequent to the beginning of that suit as purchasers, incumbrancers or otherwise were forever barred etc.

Under no theory did the bonds in suit become an incumbrance on the property till they were hypothecated by Smith eight months after the property was taken in hand by the receivers.

The simple question in the case then is, was the seizure of the sroperty by the Court and placing it in the hands of its officers, the receivers, effectual to protect it from a new and additional burden, or if as against the Railway Company a lien was acquired by the issue of the bonds during the receivership, was that lien cut off by the decree and sale.

Counsel for defendant in error, in their brief in support of the motion to dismiss, cite several cases to the effect that the doctrine of *lis pendens* does not apply to commercial paper. Counsel for the Railway Company have never questioned that proposition. But the case at bar is not one of commercial paper merely, but is a case of commercial paper secured by mortgage on real property. Mr. Lynde did not begin the action as the holder of bonds to enforce their payment against the maker or its corporate successors, but on the contrary, the object of the suit was solely to reach and

subject to their payment the real property, claimed to have been pledged for their security, but which had been seized by a Court of Chancery before their issue, and afterward duly sold to the predecessor in title of the plaintiff in error.

The plaintiff in error is not concerned with the rights of Mr. Lynde's Executors as the holders of commercial paper, but is defending its title to the real estate so acquired. It might be conceded that, notwithstanding the theft or embezzlement of the bonds by Smith and their unlawful hypothecation, the innocent holder could recover upon them in an action at law. We might also concede upon the principle announced in the case of *Carpenter* v. *Logan* 16 Wal. 271 that as against the maker of the bonds he might have enforced the lien of his mortgage for their security. But this does not meet the question, viz.: Whether as against the Court of Chancery which took the railroad into its possession for the sole purpose of preserving it, as it then stood, to answer the claim of its suitor when finally established, could the property in any manner without the consent of the Court, be thereafter encumbered by further burdens having priority over the seizure and defeating its object?

Upon this, the sole question, as we understand it, presented by the record, the cases cited by our opponents (Brief p. 7), seem to furnish no light, and in all the discussions of this case, no authority has yet been found supporting the affirmative of the above proposition.

FIRST.

The purpose and general effect of appointing receivers are of course elementary. By it the Court takes the subject matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceedings and until the final disposal of all questions legal or equitable, involved in the action. The property is a fund in Court to abide the event of the litigation, and if the creditor succeeds in establishing his right to the application of the fund it is the duty of the Court to see that such application is made. To effectuate this the Court will administer it independently of any rights acquired by third persons pending the litigation.

Wiswall v. *Sampson*, 14 How., 52.

Various devices have been resorted to by the debtor and his creditors to thwart this purpose of the Court and render ineffectual its attempt to administer the property for the benefit of those entitled to it at the time of its seizure, but such devices have uniformly proven fruitless and the ability of the Court to protect the property for its suitors has in each instance been established. The receiver cannot be disturbed in his possession of the property, no lien by judgment or attachment can be acquired upon it, the receiver cannot be garnisheed, a creditor's bill will not lie against him, no interest can be acquired in the property by act of the debtor, even by an innocent purchaser.

Wiswall v. *Sampson*, Supra.

In the latter case this Court held that while the property was in the hands of a receiver a sale by the marshal upon execution and a paper levy was absolutely void and conferred no title, even conceding the lien of the execution creditor superior to the claim of the creditor who filed the bill and procured the appointment of the receiver.

The corporation is incapable of annexing any lien to its property or of creating any equity against it after it has passed into the hands of a receiver.

Thompson Com. on the Law of Corporations, Sec. 7013, 7060, 7015.

In *Railway Co.* v. *Lewis*, 81 Tex., 1, it is held that after the receiver is appointed the property being *in custodia legis* no lien can follow the property as against the purchaser at the foreclosure sale which did not exist at the commencement of the foreclosure suit.

In *Jackson* v. *Laha*, 114 Ill., 287, the Court say page 295: it would seem an anomaly that a lien adverse to the rights of the receiver could be obtained so as to control the distribution to be made of the fund, "Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and if that could be done in this case it would withdraw the same from the custody of the law or from what is the same thing the custody of the receiver having the same in possession."

Again when in a suit for the foreclosure of a railroad mortgage a court of chancery appoints a receiver there is a seizure of something more than the mere tangible property and credits. The *franchises* of the corporation become vested in the receiver and thereafter are exercised by him under the orders of the

Court. The corporation is not dissolved; it still has a naked existence but this primary franchise viz.: the right to exist as a corporation is all that is left to it.

Thompson Commentaries on the Law of Corporations, 7002.

Central Trust Co. v. *New York, &c., R. R. Co.*, 110 N. Y., 250.

In the latter case, a foreclosure suit in which a receiver had been appointed, Peckam J., held that in such case the receiver as an officer of the Court exercises the franchises which have been conferred upon the corporation by the State and that through the Court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. On this ground the Court held that a state tax on the franchise must be paid by the receiver in preference to the rights of the mortgagees.

The Court held that the franchise was the same in both cases, only in one case it was used for the company and by it, by means of its board of directors while in the other the same franchise was used and the road operated under it by an officer of the Court until, by virtue of the legal proceedings, the receiver is discharged and the road returned to its former possessor or it is otherwise disposed of by reorganization or sale.

In the case at bar the mortgage to Roosevelt and Fosdick covered all the property and franchises of the corporation (except the franchise of existence which could not be alienated) which passed to and became vested in the receivers at their appointment, from which time all the corporate power to maintain and operate

the railroad and contract with reference thereto was exercised by the receivers until the property and franchises were sold and conveyed to the purchasers.

The power of the corporation to contract with reference to the railway and its property was as effectually taken away as though a decree of dissolution had passed.

But even commercial paper pure and simple, is subject to the defense of want of power in the maker.

The Floyd Acceptances, 7 Wal., 676.
Marsh v. *Fulton Co.*, 10 Wal., 676, 683.
Merchants' Bank v. *Bergen Co.*, 115 U. S., 384, 393.
Harshman v. *Bates Co.*, 92 U. S., 569.

The fact that the instrument bears a date when the power existed will not aid the holder.

Anthony v. *County of Jasper*, 101 U. S., 693, 698.
Coler v. *Cleburne*, 131 U. S., 162.

The case is analogous to that of an executor or administrator issuing commercial paper executed in form, but not delivered, by the decedent.

Bromage v. *Lloyd*, 1 Exch., 32.
Clark v. *Boyd*, 2 O., 56.
1 Daniels on Neg. Inst., Sec. 64.

To charge the property of the Railway Company for the payment of the bonds in question required an exercise of power which the Court had taken away from the corporation, and was itself then exercising through its receivers. What the corporation acting through its

board of directors could not do, could not, it is manifest, be done by the unauthorized and criminal act of any other agent.

At the time Mr. Lynde purchased the bonds in question, he had actual notice that the railway was in the hands of receivers.

From 1871 down to the time he purchased these bonds he had held some of the 821 bonds validly issued, secured by the Parkhurst mortgage. The interest on these bonds became in default in 1875 after the receivers were appointed, and was not paid until after June 1876, when it was paid to him by the receivers (Rec. p. 39.)

Again in October 1878 and in April 1879, A. Iselin & Co., acting for the receivers but in ignorance of the facts as to the issue of these disputed bonds, paid Mr. Lynde the interest coupons upon them, but in October 1879 the facts had come to light and further payment was refused (Rec. p. 39). But the foreclosure suit then pending continued and was not finally disposed of by a sale of the road until January 1883, more than three years thereafter. When Mr. Lynde discovered that the validity of his bonds as a lien upon the property was disputed it was his duty to have applied to the Court having possession of the property to be examined *pro interesse suo* to the end that the Court administering the fund might determine whether he held a valid lien for the payment of his bonds and order the road sold subject to them.

In *Wiswall* v. *Sampson*, 14 How., 52, this Court, Mr. Justice Nelson delivering the opinion said p. 65 :—

"The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in

Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate.

"And the mode of proceeding is the same in the case of the receiver, 6 Ves., 287; 9 *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the Court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the Court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

* * * *

"The settled rule, also, appears to be, that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the Court pending the litigation by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even if for a

valuable consideration, comes in at his peril. 3 Swanst. 278, n, 298, n; 2 Daniel's Pr. 1267; 6 Ves. 287; 9 *ibid* 336; 1 J. & W. 178; 3 Daniel's Pr. 1984.

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the Court, and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in Court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the Court to see that such application is made. *And in order to effect this, the Court must administer it independently of any rights acquired by third persons, pending the litigation.* Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.

"It is true, in administering the fund, the Court will take care that the rights of prior liens or encumbrances, shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the Court will be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

* * * *

"We agree that the person holding the prior legal lien or encumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the Court.

This notice can be readily given on the report of the master, of the prior liens or encumbrances resting upon the estate.

But it is not necessary to go this length in the case before us, as it is sufficient to say, that the sale under the judgment, pending the equity suit, and while the Court was in possession of the estate, without the leave of the Court, was illegal and void. We do not doubt but that it would be competent for the Court, in case the judgment creditor, holding the prior lien, had not come in and claimed his interest in the equity suit, to decree a sale, in the final disposition of the fund, subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the Court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

Knowing during the three years and more from October, 1879, to January, 1883, that the validity of his lien was disputed, Mr. Lynde took no steps to establish the same, but suffered the proceedings to go on

and the Court to make the order conveying the title to the purchasers as the title stood at the commencement of the suit by Roosevelt and Fosdick, to-wit: encumbered by the mortgage to Parkhurst to the sum of $821,000, and no more. It would seem that this was such a misleading of the Court as should conclude the defendant in error now.

In no department of Judicial administration have Courts been more jealous of any infringement upon their authority or more firm in upholding it than in the administration by Courts of Chancery of property in their custody through receivers. Yet if the position of the State Court is correct, the issue and sale of mortgage bonds fraudulently effected while the Court is in possession may wrest the property out of the hands of the Court, and render its authority vain and its decrees fruitless.

We submit that the interests of commerce do not demand that the Courts shall go thus far.

SECOND.

The rule is elementary that all liens acquired upon the subject matter of the suit *pendente lite*, are cut off by the decree.

On the other hand it is equally clear that the doctrine of *lis pendens* does not apply to *commercial paper.*

The first is the general rule, the latter is an exception to it.

In the case of *Warren Co.* v. *Marcy*, 97, U. S., 96, Mr. Justice BRADLEY says :

"It is a general rule that all persons dealing with property, are bound to take notice of a suit with regard to the title thereto and will, on their peril, purchase the same, from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way."

Justice Bradley further says that the object of this exception "is to protect the commercial community by removing all obstacles to the free circulation of negotiable paper."

But as to real estate, referring to the case of *Murray* v. *Ballon*, 1 Johns, Ch. 566, he says: "That case related to land *with regard to which the rule is uniiversally applied.*"

This doctrine of *lis pendens* as relating to real estate is founded upon its necessity for the authoritative administration of justice. In the leading case of *Murray* v. *Lylburn*, 2 Johns, Ch. 441, quoted from at length by Justice Bradley, Chancellor Kent says: "There is no principle better established nor one founded on more indispensable necessity than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit who are not to receive any prejudice from the alienation."

In *Metcalf* v. *Pulvertoft*, 2 Ves. & Beam, 199 the Vice Chancellor said :

"The *lis pendens* is presumptive if not actual notice and the purchaser is in the same situation in which the vendor stood ; upon this plain principle, *that the suit is to be decided according to the state of things when*

it was instituted; and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary act of either party.

"This is the principle running through all the cases, both at law and in Equity."

In *Gaskill* v. *Durdin*, 2 Ball & Beatty, Irish Chancery, 167, the Lord Chancellor said:

"The rule of this Court undoubtedly is that any interest acquired in the subject matter of a suit, pending the suit, is so far considered a nullity, that it cannot avail against the plaintiff's title, and if this rule were not attended to there would be no end to any suit, the Justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. *It is extremely difficult to draw any line, and very dangerous to allow of the rule being frittered away by exceptions.*"

We have not been able to find any case in which the exception to the rule of *lis pendens* in favor of commercial paper has been extended to include a mortgage lien to secure such paper acquired during the pendency of the suit.

In the case of a purchase of bonds of an insolvent railway company in the hands of a Court of Chancery for the just administration of its assets, the inconveniences to the commercial world of requiring the purchaser to ascertain that they were issued before the sequestration of the property, would, we respectfully submit, be less harmful than to admit that the Court having seized the property, is unable to administer it for the benefit of those to whom it rightfully belongs.

Respectfully submitted,

Edwd E Dunn

Of Counsel for Plaintiff

No. 552. 105. 16.
Brief of Maxwell for P. C. Co.
Filed Oct. 26, 1896.
Supreme Court U. S.
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 552.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of the last will and testament of CHARLES R. LYNDE, deceased.

In Error to the Supreme Court of the State of Ohio.

Mr. Maxwell's Brief for the Plaintiff in Error, in Opposition to the Motion to Dismiss or Affirm.

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The object of this brief is not to enter the ground covered by Mr. Burr's brief, but only to add a suggestion to the argument, which he was obliged to prepare and submit during the absence of his colleague from the country, and without an opportunity to confer with him. For a statement of the case the court is therefore referred to Mr. Burr's brief. Indeed, we do not feel called upon, on this motion, to argue the federal question involved, or to do more than to state it, for we are concerned now only in refuting the suggestion that the writ is taken "for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

The Court of Common Pleas of Franklin County, Ohio, from which the case was taken by successive proceedings in error to the Circuit Court of Franklin County, and thence to the Supreme Court of Ohio, found the facts specially. There is therefore no room to dispute the facts.

The plaintiff in error by the third defense of its answer (Rec. 14-20) set up specifically and with great detail its claim of title and of immunity from the lien asserted by the plaintiff, under and by virtue of the proceedings and decrees of the Circuit Courts of the United States for the Southern District of Ohio, the district of Indiana, and the Northern district of Illinois in the foreclosure suits of Roosevelt and Fosdick; and the facts alleged in that defense with reference to those proceedings are all established by the special finding of facts. In other words, it appears that when those suits were commenced in the federal court, and when the court placed the road in the hands of receivers, the property was incumbered by the lien of the Parkhurst mortgage to the amount of $821,000, *and no more.* Finding No. VI. declares specifically that Lynde's bonds remained "*unissued* until the months of November and December, A.D. 1875" (Rec. 31), which was more than nine months after the commencement of the suits of Roosevelt and Fosdick. Finding XIX. declares that "no authority or consent was ever given by the Board of Directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said 179 bonds, or any of them." And finding No. XXXVII. shows how and when, to wit, in November and December, A.D. 1875, the bonds first got out.

The Columbus, Chicago & Indiana Central Railway Company was a party to Roosevelt and Fosdick's suit, and Lynde's claim of a lien upon the road is under that company. But the federal court by a decree operative against that company and all persons claiming under it subsequently to the commence-

ment of the suit, undertook to invest the purchaser with the property as fully and completely as the Columbus, Chicago & Indiana Central Railway Company held it "at the commencement of the suit" and "free, clear and discharged of all rights, estate and interest, claim, lien and equity of redemption in or to the premises and property, rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them, or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick." [Findings XXVIII., XXIX. and XXXII., Rec. 36, 37.]

It must be admitted, therefore, that Lynde's lien, if it was created by the Columbus, Chicago & Indiana Central Railway Company after the commencement of the Roosevelt and Fosdick suits, is barred by the decrees therein as against the purchaser of the road under those decrees. If, for instance, Lynde claimed under a mortgage of the Columbus, Chicago & Indiana Central Railway Company issued and *dated* subsequent to the commencement of Roosevelt and Fosdick's suits, no one could dispute that his title would be barred by the decrees in those cases, and that a denial of such effect to those decrees would be a refusal to give them full faith and credit.

This the Supreme Court of Ohio concede. They say: "The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under the subsequent mortgages would be entitled to a prior lien on the property," etc. "But," they add, "the date of the lien of the bonds does not depend upon the date of their original negotiation." [Rec. 64, 65.] In other words, they hold that, although Lynde does claim under the Columbus, Chicago & Indiana Central Railway Company, and although his bonds were not issued until after the commencement of the Roose-

velt and Fosdick suit, so that his lien was not *in fact* created until after the commencement of that suit, he is nevertheless entitled, as against the purchaser under that decree, to escape its plain terms by insisting, as matter of law, that his lien antedates the commencement of the suit.

But where the question is one of power, the want of authority can not be supplied, even in the case of commercial paper, by antedating the act. In Anthony vs. County of Jasper, 101 U. S. 693, 698, Waite, C. J., said:

"Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. *After the power of an agent of a private person has been revoked, he can not bind his principal by simply dating back what he does.* A retiring partner, after due notice of dissolution, can not charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, *and is always open to inquiry, no matter who relies on it.* The question is one of the authority of him who attempts to bind another. *Every one who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other.* In Bayley vs. Taber (5 Mass. 285), it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain date, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that date, although they bore a previous date."

Coler vs. Cleburne, 131 U. S., 162, was a suit by a bona fide holder of municipal bonds that bore date January 1,

1884, but were not in fact signed until July 3, 1884. The person who signed them was the mayor on January 1, 1884, but had gone out of office in April, 1884. He signed under a resolution of the city council and appended the word "mayor" to his signature. The court, following Anthony vs. County of Jasper, and quoting at length the foregoing passage from the opinion of Chief Justice Waite, held that no one could lawfully sign the bonds but the person who was mayor of the city when they were in fact signed; that the city was not estopped from showing the facts as to the signature, and that the bonds were invalid.

Lynde's claim rests after all upon the sole ground that, although in respect of his bonds no lien had *in fact* been created prior to the commencement of Roosevelt and Fosdick's suit (because the bonds had not then been issued and the maker had been long defunct) they bore a prior date, and he was entitled to assume that they had been issued at their date. As against the supposed maker of the bonds, in a suit to enforce them as mere money obligations, the principles of estoppel might be sufficient to sustain this claim. But the plaintiff in error is an innocent purchaser, under a decree which protects it against all liens put upon the property by the Columbus, Chicago & Indiana Central Railway Company after the commencement of Roosevelt and Fosdick's suit, and if Lynde's lien comes within that description (as it clearly does), he can not, as against the plaintiff in error, invoke any principle of estoppel to evade the plain terms of the decree, especially in view of the fact that he was aware of the cloud upon his lien long prior to the sale, and remained silent, permitting the plaintiff in error to purchase the road upon the assumption that only 821 of the Parkhurst bonds were outstanding.

We respectfully submit that the Supreme Court of Ohio has not given due effect to the decrees of the federal courts

in the suits of Roosevelt and Fosdick, because it has recognized as paramount, in favor of one claiming under a party to those decrees and against the purchaser thereunder, a lien which did not exist at the commencement of those suits, but which was created during their pendency; that this court therefore has jurisdiction to review the judgment of the Supreme Court of Ohio (Embry vs. Palmer, 107 U. S. 3; Dupasseur vs. Rochereau, 21 Wall. 130); and that the proposition that Lynde's lien shall be taken out of the category of those created after the commencement of said suits, is not so clear as to warrant the disposition of the case in the summary manner proposed by opposite counsel, without an opportunity for the usual argument.

It is proper to state that while the present case was pending in the Supreme Court of Ohio, Lynde commenced a suit to establish his lien in the Circuit Court of the United States for the district of Indiana, upon the pretence that the Ohio decree was void so far as it covered the portion of the road situated in Indiana. Of course that was a mere excuse, because the road between Columbus, Ohio, and Indianapolis, Indiana, is a part of the Pennsylvania trunk line, and if it is established in a court of last resort that Lynde has a lien for his 36 bonds they will be paid. But he nevertheless insisted upon vexing the plaintiff in error with a second suit, covering the same questions involved in the present suit and all of them. The case is now pending in the United States Circuit Court of Appeals for the seventh circuit, where it was fully argued upon the merits nearly a year ago, and is awaiting the decision of the court. It may be that that decision will end the controversy.

Respectfully submitted,

LAWRENCE MAXWELL, JR.

CHARLES E. BURR,
Of Counsel.